United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 15, 2025

The Honorable Jared Huffman
U. S. House of Representatives
Washington, D.C. 20515

Dear Representative Huffman:

Thank you for your letter of January 7, 2025, asking for the Bureau of Land Management's (BLM's) position on whether Resource Management Plans ("RMPs") approved pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712, are considered "rules" under the Congressional Review Act (CRA), 5 U.S.C. § 804(3), and must therefore be reported to Congress under the terms of that Act. For the reasons provided below, the answer to this question is no.

RMPs have never been considered rules by the Department of the Interior (Department) or any reviewing court. For that reason, the Department has never reported the approval of an RMP, or RMP revision or amendment, as a "rule" under the CRA. Since the CRA provides that "rules" do not take effect until reported to Congress and the Comptroller General as provided in that Act, treating them as rules under that statute could, at a minimum, cause uncertainty regarding the effectiveness of BLM RMPs going back to the passage of the CRA in 1996—as well as the validity of implementation decisions issued in conformance with those RMPs (e.g., oil and gas leases and approvals to drill, livestock grazing permits and leases, rights-of-way for energy generation and transmission, travel management plans).

Further, the CRA's prohibition on issuing a rule in "substantially the same form" unless authorized by a subsequent law if a rule is subject to a joint resolution of disapproval, could have extremely far-reaching consequences for BLM plans that make hundreds of overarching allocation decisions across millions of acres, ranging from availability for oil and gas leasing to appropriate management levels for wild horses and burros.

As an initial matter, relevant legal authorities that inform the Department's answer are the following:

1. Administrative Procedure Act

The 1946 Administrative Procedure Act (APA) governs the procedures of federal agencies, including establishing how agencies develop rules. Under section 551 of the APA, a "rule" is broadly defined, in relevant part, as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...[1]

Most rules under the APA fall generally into three categories: "substantive" or "legislative" rules, which have the force and effect of law; interpretative rules, which advise the public of the agency's construction of the statutes and rules it administers; and general statements of policy, which advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.[2] The primary practical distinction between the categories of rules is that legislative or substantive rules require notice-and-comment rulemaking, while interpretative rules and general statements of policy do not.[3]

2. Congressional Review Act

The 1996 Congressional Review Act establishes a process for congressional review of federal agency rules. Agencies must submit a final rule to both Houses of Congress and to the Comptroller General before it can take effect.[4] Upon submission, Congress has 60 session days to review and take action,[5] including the passage of a joint resolution of disapproval which if signed by the President, or if Congress successfully overrides a presidential veto, the rule at issue cannot go into effect or continue in effect.[6] A rule that is disapproved, "may not be reissued in substantially the same form, and a new rule that is substantially the same...may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[7]

The CRA explicitly borrows its definition of "rule" from the APA definition, but then narrows it by exempting certain categories of action from its definition. Specifically, it provides that:

> The term "rule" has the meaning given such term in section 551, except that such term does not include—
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> (A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;
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> (B) any rule relating to agency management or personnel; or
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> (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.[8]

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[1] 5 U.S.C. § 551(4).

[2] *See* Attorney General's Manual on the Administrative Procedure Act, 30 n.3 (1947).

[3] 5 U.S.C. § 553(b)(A). Certain other types of rules (e.g., rules of agency personnel, practice, and procedure) are also exempt from notice-and-comment rulemaking. *See id.*; *see also* 5 U.S.C. § 553(a).

[4] 5 U.S.C. § 801(a)(1)(A).

[5] 5 U.S.C. § 801(d).

[6] 5 U.S.C. § 801(b).

[7] 5 U.S.C. § 801(b).

[8] 5 U.S.C. § 804(3). To be sure, the definition of "rule" under the CRA is broader than legislative rules requiring notice-and-comment under the APA, since the CRA definition does not exempt general statements of policy and

3. Federal Land Policy and Management Act

In 1976, between the passage of the APA and the CRA, Congress passed the Federal Land Policy Management Act (FLPMA). FLPMA directs the BLM to develop, maintain, and when appropriate revise RMPs, "which provide by tracts or areas for the use of the public lands."[9] It also specifically directs the Secretary to allow for public involvement in the development of RMPs and to establish procedures by regulation to give the public notice and an opportunity to comment, which the BLM has done.[10] Specifically, the BLM's planning regulations provide a 30-day public comment period when the BLM initiates a planning effort,[11] a 90-day public comment period on draft RMPs,[12] a 30-day protest period for proposed planning decisions,[13] and a governor's consistency review process.[14]

RMPs are tools in which "present and future use is projected."[15] The Supreme Court has described a BLM land use plan as "generally a statement of priorities; it guides and constrains actions but does not (in the usual case) prescribe them."[16]

FLPMA also requires the Secretary to report to the House and Senate any management decision or action in an RMP that excludes, "one or more of the principal or major uses[17] for two or more years with respect to a tract of land of one hundred thousand acres or more."[18]

In addition, on November 15, 2017, in response to an inquiry from Senator Murkowski (Alaska), the U.S. Government Accountability Office (GAO) issued an opinion concluding the BLM's Eastern Interior RMPs finalized on December 30, 2016 are rules under the CRA.[19] The November GAO opinion relied in part on the analysis in the October 23, 2017 GAO opinion that found the United States Forest Service (USFS) 2016 Tongass Amendment is a rule under the CRA.[20] GAO similarly concluded the Eastern Interior RMPs possess the three components of a rule under the APA and the three types of rules excluded from the CRA do not apply. Specifically, the opinion concludes the RMPs are agency actions, make recommendations and designate future uses for covered areas,[21] and the RMPs are designed to implement, interpret or

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interpretive rules and only exempts certain types of rules relating to agency organization, procedure, or practice. *Id.*; *see also* 142 Cong. Rec. H3005 (March 28, 1996).

[9] 43 U.S.C. § 1712(a).

[10] 43 U.S.C. § 1712(f); 43 C.F.R. part 1600.

[11] 43 C.F.R. § 1610.4-2(c).

[12] 43 C.F.R. § 1610.2(e).

[13] 43 C.F.R. § 1610.5-2(a)(1).

[14] 43 C.F.R. § 1610.3-2(e).

[15] 43 U.S.C. § 1701(a)(2).

[16] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004).

[17] Principal or major uses, "includes and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." 43 U.S.C. § 1702(*l*).

[18] 43 U.S.C. § 1712(e)(2).

[19] B-329065; November 15, 2017, *available at:* https://www.gao.gov/products/D18066#mt=e-report. As noted in the opinion, GAO contacted the Department of the Interior to obtain legal views on the subject of the request, but the Department could not provide views due to the absence of a more complete leadership team. B-329065, fn 1.

[20] B-238859; October 23, 2017, *available at:* https://www.gao.gov/products/D17933#mt=e-report.

[21] Specifically, the RMPs have future effect because they prescribe policies for future use of the areas they cover, such as where off-highway vehicles are permitted.

prescribe law or policy.[22] Moreover, the GAO opined that the CRA exceptions do not apply because the RMPs: 1) are rules of general applicability; they govern all natural resource management activities, projects and persons that engage in uses permitted by projects, 2) do not relate to agency management or personnel because they are concerned with the management of uses of the areas they govern by the public rather than management of BLM itself or its personnel, 3) have a substantial effect on non-agency parties, and 4) designate uses by non-agency parties that may take place in the areas they govern.

While the definition of a rule under the APA and the CRA is broad, the specific provisions governing the development of RMPs in FLPMA override the more general direction in the APA and the CRA.[23] Congress provided specific direction in FLPMA governing the process and procedures applicable to development of RMPs and BLM has followed that direction. Nowhere in FLPMA or the legislative history for the Act does Congress suggest that an RMP is a rule under the APA or subject to the APA's rulemaking procedures. Instead, FLPMA provides alternative procedures for public participation in the planning process, which Congress instructed the BLM to establish by rule.[24] Had Congress intended for the BLM to promulgate RMPs through the rulemaking process, it would have directed the agency to do so; as it did in section 202 of FLPMA when it directed the BLM to establish particular procedures regarding planning *by regulation.*[25]

Additionally, Congress structured FLPMA to differentiate between the development of RMPs under section 202 and "rules." A separate provision of FLPMA, section 310, 43 U.S.C. § 1740, authorizes the Secretary to "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands." *Id.* Section 310 expressly provides that the development of any such rules or regulations would be governed by the rulemaking procedures contained in the APA. *Id.* Reading sections 202 and 310 together, it is clear that Congress drafted FLPMA to distinguish between the RMP decision-making process, in section 202, and the promulgation of "rules" under section 310 and subject to APA rulemaking procedures. There is also no indication in the CRA that Congress sought to include *any* rules that would not qualify as rules under the APA; indeed, it narrowed the applicability of the CRA to a subset of what qualify as APA rules.

Moreover, FLPMA provides alternate procedures to report certain decisions in an individual RMP to Congress. The Secretary must report to the House and Senate any management decision or action in a resource management plan that excludes "one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more."[26] Similar to the provisions in the CRA, FLPMA includes procedures for congressional resolution of non-approval that can result in the Secretary terminating the reported action.

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[22] In defining what is a "rule," the CRA adopts the APA definition of a rule: "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).
[23] *See Brown v. General Services Administration*, 425 U.S. 820, 834-35 (1976) (a precisely drawn, detailed statute pre-empts a more general one).
[24] 43 U.S.C. § 1712 (f).
[25] 43 U.S.C. § 1712(f) (directs the agency to promulgate regulations to establish procedures to give Federal, state and local governments, and the public notice an opportunity to comment on and participate in the formulation of plans).
[26] 43 U.S.C. § 1712(e)(2).

Although the CRA was enacted after the passage of FLPMA, it is unlikely Congress intended by silence when it passed the CRA to subject RMPs to reporting and disapproval requirements in the CRA when similar more specific requirements already existed in FLPMA.

The BLM's land use planning regulations promulgated in 1983 but revised in 2005 (after the passage of the CRA) establishing the procedures for development, amendment, and revision of an RMP also do not suggest a plan is a rule or require compliance with APA rulemaking procedures or reporting under the CRA.[27] The regulations do provide specific direction for public, local, state and tribal participation in the planning process for an individual planning effort; and restate the congressional reporting requirements in FLPMA.[28] They reflect the BLM's longstanding interpretation and practice that RMPs are not rules and are not subject to rulemaking requirements or otherwise subject to the CRA.

Even if an RMP is a "rule" under the APA, it falls within the exceptions provided in the CRA. Specifically, an RMP would be a "rule of particular applicability."[29] While the GAO opinion finds that RMPs are rules of general applicability because they govern all natural resource management activities, the analysis fails to account for the fact that the BLM manages approximately 247 million acres of surface land and 700 million acres of mineral estate, but each individual RMP governs the particular resources and uses in a well-defined and smaller geographic area. Specifically, the BLM organizes its land use planning around discrete geographic areas, called planning areas or resource areas.[30] Resource areas are also known as field offices, which are the administrative area where generally the BLM field manager has primary responsibility for day-to-day activities.[31] Unless the BLM State Director for the planning area determines otherwise, the planning area for an RMP is the geographic area associated with a particular field office.[32] Unlike the BLM's planning regulations, which were developed nationally, and are of general applicability since they provide the process for developing and revising all RMPs, an individual RMP has particular applicability to the planning area managed by the RMP. Moreover, in contrast to rules governing the BLM, which are signed and approved by the Department of the Interior,[33] in most cases the BLM State Director issues an RMP.[34]

Finally, an RMP would typically also be exempt under 804(3)(C) as a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." As previously discussed, an RMP is a tool in which "present and future use is projected."[35] Because RMPs do not in the usual case prescribe particular actions they do not substantially affect the rights or obligations of non-agency parties.[36] The Supreme Court's

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[27] 43 C.F.R. Part 1600.
[28] 43 C.F.R. § 1610.1(b).
[29] 5 U.S.C. § 804(3)(A).
[30] 43 C.F.R. § 1610.0-5(m).
[31] 43 C.F.R. §1610.0-5(m).
[32] 43 C.F.R. § 1610.1(b).
[33] Department of the Interior, Departmental Manual; 109 DM 7.
[34] 43 C.F.R. § 1601.0-4.
[35] 43 U.S.C. § 1701(a)(2).
[36] The GAO opinion cites OHV area designation decisions in RMPs as a reason RMPs are not exempt from the CRA definition of a rule. While most plans do include OHV area designations that designate certain areas as open, closed or limited to OHV use, generally specific travel management planning that designates specific routes and authorizes or precludes use on designated areas is done through a separate decision-making process after the BLM makes planning level OHV area designations in the planning area.

decision in *Ohio Forestry Association v. Sierra Club* is also instructive on the issue of what actions substantially affect the rights of non-agency parties. Specifically, the Court explained that U.S. Forest Service land use plans, which are similar to BLM RMPs, "do not command anyone to do anything or refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations."[37] In short, they do not typically substantially affect the rights of non-agency parties.

Given that the specific provisions governing the development of RMPs in FLPMA override the more general direction in the APA, and the CRA and FLPMA's specific procedures for congressional resolution of non-approval that can result in the Secretary terminating the reported action, RMPs do not constitute rules for purposes of the CRA and the BLM is not required to report the approval of an RMP to Congress under the CRA.

Importantly, the consequences of considering RMPs rules at this time would be significant. If all RMPs are subject to the CRA but were never submitted, there is at a minimum significant uncertainty as to whether post-1996 RMPs have ever gone into effect,[38] which also raises questions as to the validity of implementation decisions issued pursuant to these plans that were issued under a plan that was never in effect.[39] Additional confusion would arise regarding what planning decisions would then govern the acres at issue and how the lack of current environmental analysis would affect ongoing management. Further, making RMPs potentially subject to congressional resolutions of disapproval and the associated prohibitions on promulgating rules in substantially the same form barring a new law could affect hundreds of decisions across millions of acres for each RMP. Right now, the BLM estimates more than 166 million acres of plans approved since the passage of the CRA would be affected. Finally, other federal agencies that develop plans similar to RMPs could be implicated by this decision, rendering the potential impacts even greater.

We appreciate your interest in the BLM's stewardship of lands and minerals under its jurisdiction.

Sincerely,

Robert T. Anderson
Solicitor

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[37] *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 733 (1998).
[38] 5 U.S.C. § 801(a)(1)(A) ("before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report….").
[39] *See* 43 C.F.R. § 1610.5-3 ("all future resource management authorizations and actions…..shall conform to the approved plan").